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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-636

FRANK W. COKER and REGINA COKER

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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Attorney for Petitioners

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After this Court acquired jurisdiction of this case on October 11, 1973, on filing of this Petition for Certiorari, a meeting was held in the Washington, D.C. chambers of Hon. Howard A. Dawson, Jr., Chief Judge of the U.S. Tax Court. The meeting had been called by Judge Dawson and was attended by Judge Dawson, Charles S. Casazza, Esq. (Clerk of the Tax Court), Robert A. Bridges, Esq. (National Director of Tax Court litigation division of the Treasury Department), and Steedly Young, Esq. of the New York Regional Counsel's office for the government — and the undersigned Thomas J. Carley for the people. As a result of this meeting the following was determined:

1. Judge Dawson (and all the other Tax Court judges) are thoroughly confused by this Court's June 25, 1973 decision in *Fausner* v. *Commissioner,* No. 72-1396. There is some irony in this because Judge Dawson was the trial judge in the *Fausner* Tax Court trial — now Judge Dawson does not understand how he could have found as a fact that Fausner's expenses could simultaneously fall into both the necessary and unnecessary categories.

2. The Treasury Department trial attorneys of the nation are thoroughly confused by the *Fausner* decision. In the New York Regional Counsel's office alone, it was stated that there are no less than 20 differing opinions or guesses on what the *Fausner* decision means or what was possibly intended to have been meant or not meant.

3. There are not less than 380 docketed cases awaiting trial in the Tax Court raising precisely the identical Constitutional issues presented in this Petition for Certiorari by Coker. Instead of trying all these cases, it was agreed by Chief Judge Dawson for the Tax Court and by the Treasury Department representatives present that all 380 cases awaiting trial would be continued generally in the hope and prayer that the Supreme Court would grant certiorari in this Coker case, receive briefs, permit oral argument and write a definitive opinion on all the Constitutional questions here presented by Coker.

Also since this Court acquired jurisdiction of this case on October 11, 1973, there is yet another case before the United States Court of Appeals for the Second Circuit. In *DeMichele* v. *Commissioner of Internal Revenue,* C.A. 2, Docket No. 73-2299, the Commissioner is contending that 71% of DeMichele's commuting costs are deductible and DeMichele is contending for the extra 29%. How, in

the name of common sense, can the Second Circuit decide the *DeMichele* case without guidance from this Court on all the Constitutional questions presented on this *Coker* Petition for Certiorari? Even if all of DeMichele's constitutional and statutory rights are discarded, the worst that can come out of the *DeMichele* case is a holding that 71% of DeMichele's commuting expenses are deductible.

A week after the Second Circuit lost jurisdiction of this *Coker* case to the Supreme Court, the Second Circuit allegedly entered another opinion in this Coker case on October 17, 1973 (Comm. Memo 6-8) equating the *"happenstance"* theory of *Fausner* with Coker's *"necessity"* of bringing his 1964 Oldsmobile and tools to work in order to be able to do the extensive on-the-job traveling and work required of Coker. Aside from the lack-of-jurisdiction problem, how is the Second Circuit to write a sensible opinion in the *DeMichele* case where the Commissioner has already conceded that 71% of commuting expenses are deductible?

Coker is petitioning for a writ of certiorari to review the judgment of the Second Circuit entered on May 14, 1973. Even the Commissioner agrees that the May 14, 1973 judgment is erroneous, but nevertheless urges this Court to deny certiorari, and permit the mere allowance of 71.811239% of Coker's ordinary and necessary business expenses to stand as an affront to common sense and the United States Constitution.

Frank Coker's 1966 trade or business gross receipts amount to	$11,291.35
Frank Coker's 1966 ordinary and necessary business expenses of commuting and travel on the job in getting the above stated trade or business gross receipts amounted to	2,678.94

Frank Coker's 1966 trade or business *"INCOME"* was precisely $ 8,612.41

The Sixteenth Amendment to the Constitution of the United States grants Congress only the power to lay and collect taxes on Frank Coker's $8,612.41 "INCOME".

Section 162(a) of the Internal Revenue Code provides that "ALL" of Frank Coker's $2,678.94 ordinary and necessary expenses of commuting and travel on the job "SHALL" be allowed as a deduction from Frank Coker's $11,291.35 trade or business receipts.

A generation ago the Second Circuit instructed that our American scheme of "INCOME" taxation provides that from Frank Coker's $11,291.35 receipts, it is necessary to take all Frank Coker's $2,678.94 ordinary and necessary expenses incurred in getting the $11,291.35 in order to reduce the $11,291.35 receipts down to what is in fact Frank Coker's true "INCOME" of $8,612.41 and so lawfully taxable as such. *Davis* v. *U.S.*, 87 F.2d 323, 324, 325 (CCA 2d, 1937), cert. denied 301 U.S. 704, 81 L. Ed. 1359, 57 S. Ct. 937 (1937).

Measured against every honorable American standard of Constitutional law, the Commissioner may tax only Frank Coker's "INCOME" of $8,612.41 and not one cent more.

The Commissioner's attempt to tax Frank Coker's "INCOME" *plus* an extra $1,132.74 is clearly not based on our American Constitutional scheme of "INCOME" taxation.

Since the adoption of the 16th Amendment to the Constitution in 1913 and the enactment of the Income Tax Act of 1913, no definitive ruling has been made by the Supreme Court on the Constitutional questions here presented.

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for oral argument.

Respectfully submitted,

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December, 1973.